

EXHIBIT D

ORIGINAL

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: INACOM CORP., et al.,

-----x
INACOM CORP., on behalf of all
affiliated Debtors,
Plaintiff,
-against-
TECH DATA CORP.,
Defendant.

Civ Act No.
04-148 GMS
Adversary No.
02-03496 PJW

-----x
INACOM CORP., on behalf of all
affiliated Debtors,
Plaintiff,
-against-
DELL COMPUTER CORPORATION,
Defendant.

Civ Act No.
04-582 GMS
Adversary No.
02-03499 PJW

-----x
INACOM CORP., on behalf of all
affiliated Debtors,
Plaintiff,
-against-
LEXMARK INTERNATIONAL, INC.,
Defendant.

Civ Act No.
04-583 GMS
Adversary No.
02-03500 PJW

-----x
INACOM CORP., on behalf of all
affiliated Debtors,
Plaintiff,
-against-
INGRAM ENTERTAINMENT, INC.,
successor in interest to
NASHVILLE COMPUTER LIQUIDATORS,
Defendant.

Civ Act No.
04-593 GMS
Adversary No.
02-03960 PJW

July 28, 2005

5:19 p.m.

Deposition of RICHARD A. WHALEN

Computer Reporting Incorporated

CRI

501 Fifth Avenue New York, NY 10017
(212) 986-1344 Fax (212) 983-9149 www.crinyc.com

July 28, 2005

5:19 p.m.

Deposition of RICHARD A. WHALEN, held
at the offices of Pachulski Stang Ziehl
Young Jones & Weintraub, 780 Third Avenue,
New York, New York, pursuant to Agreement,
before John Ianno, Jr., a Notary Public of
the State of New York.

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ALSO PRESENT:

DEAN VOMERO

JASON FENSTERSTOCK

1

2 **R I C H A R D A. W H A L E N,**

3 called as a witness, having been first duly
4 sworn by the Notary Public (John Ianno, Jr.),
5 was examined and testified as follows:

6 **EXAMINATION BY**

7 **MR. CAINE:**

8 Q. Could you please state your name.

9 A. Richard Whalen.

17:18:59 10 Q. Have you ever had your deposition
11 taken before?

12 A. Yes.

13 Q. On how many occasions?

14 A. I believe twice.

17:19:06 15 Q. When was the last time you had your
16 deposition taken?

17 A. Last one was November of 2004.

18 Q. What was the subject matter of that
19 deposition?

17:19:13 20 A. It was a -- as an expert, it was a
21 valuation case, valuation of an internet-based
22 bank.

23 Q. Was that in the context of litigation?

24 A. Yes.

17:19:28 25 Q. Where was the litigation based?

1 **R. Whalen**

2 Merger Stat did not hand us Entex as a
3 possibility.

4 Could be something else. Could be the
17:57:16 5 fact there wasn't enough information to make the
6 database, but it did hand us a bunch of other
7 transactions that we whittled down to the 14 best,
8 and that's what depicted in our transactions.

9 Q. The third area of the opinion that you
17:57:42 10 mention with respect to the Bridge May 27 report
11 is with respect to general valuation methodologies
12 and commonly accepted practices, and I think you
13 mentioned in that area whether you use post
14 valuation date data -- did I state that correctly?

17:58:00 15 A. I think that's -- yes, I think that's
16 accurate.

17 Q. What you are your opinions in this
18 area?

19 A. It is not my opinion, but what I
17:58:11 20 have -- let me just say that popular opinion or
21 valuation theory says that when you are standing
22 there on a certain valuation date, you must use
23 information reasonably available as of that date.
24 The definition of fair market value is a willing
17:58:27 25 buyer, willing seller, reasonable knowledge and no

1 **R. Whalen**

2 compulsion to buy or to sell.

3 Reasonable knowledge means I could
4 have reasonably known this fact on this date. You
17:58:39 5 can use that -- in this example, financial
6 statements at times, if you are doing a valuation
7 as of December 31st, you know the final audit
8 didn't come out until March, financials weren't
9 really assembled in that manner on December 31st,
17:58:54 10 you weren't sitting there nice and pretty.

11 However, the numbers existed, and I suppose if the
12 auditors worked hard enough, the financials could
13 have existed on that date.

14 So I guess there are -- that's one of
17:59:07 15 the examples I can offer you, where something
16 that -- where that is stretched, I suppose, but
17 the reason I bring that up is in reading this for
18 the first time, there were a lot of things in here
19 that occurred after the valuation date, that I
17:59:25 20 didn't -- I wouldn't have checked or looked into,
21 or thought about really, would have dismissed them
22 because they aren't -- against the rules to
23 include them.

24 Q. Is whether something reasonably could
17:59:46 25 have been known on or before the valuation date a

1 **R. Whalen**

2 matter of judgment?

3 A. The answer with many, many things, I
4 suppose -- well, financial statements and some of
17:59:59 5 these things are quite quantitative, if a
6 financial event occurs, or I can give you example
7 of other kinds of events that effect the
8 marketplace.

9 Price of soybeans for Cargill, that
18:00:13 10 comes out on March 13, the price of their division
11 is different on March 11 versus March 15, because
12 that price changed. Could they have reasonably
13 known that was going to occur on March 11? If
14 they did, then they should have take that into
18:00:29 15 account, and if they knew the report was going to
16 come out from the government with a different
17 price -- trying to think of an example for you.

18 Q. Let me ask the question in this way:
19 Is it the province of the person performing the
18:00:46 20 valuation to exercise their judgment as to whether
21 to consider certain information because it may or
22 may not have been reasonably foreseeable or could
23 have been known prior to the valuation day?

24 A. Like many other things, I suppose
18:01:07 25 sometimes it can fall into the judgment of the

1 **R. Whalen**

2 appraiser, but some things are very, very
3 clear-cut.

4 Q. If you are valuing a company at a date
18:01:17 5 in the past, and much like the information that
6 might be contained in a financial statement as of
7 a certain date, that's prepared sometime
8 thereafter, is it inappropriate to use information
9 reported after the valuation date, regarding facts
18:01:39 10 that occurred before the valuation date?

11 A. You have to decide whether or not
12 those facts were known. Reasonable knowledge,
13 that's part of the definition of the fair market
14 value, reasonable knowledge. That means a
18:01:53 15 reasonable investor, willing buyer in this case,
16 would the willing buyer have known this.

17 If a corporate insider has knowledge
18 in their head three days before a corporate event,
19 and doesn't tell anybody, you can't use that
18:02:06 20 information, even if two weeks later they say I
21 was really thinking that at that barbecue on
22 Sunday, should have told somebody.

23 You can't use that data.

24 Q. A willing buyer is going to want as
18:02:21 25 complete information as possible?

1 **R. Whalen**

2 A. Of course.

3 Q. And depending upon the nature of the
4 asset, likely to do extensive due diligence?

18:02:30 5 A. As best they can, yes.

6 Q. Let me give you an example in this
7 case. The Blackstone Group did projections in May
8 of 2000. Have you seen those?

9 A. I don't think so.

18:02:48 10 Q. Just assume the following: They did
11 projections for Inacom Service Systems in May of
12 2000 that included data, actual data prior to
13 April 22. Is that --

14 A. Historical data.

18:03:07 15 Q. Yes, is that something that should be
16 considered for a valuation done as of April 22nd?

17 A. You mean should another -- Blackstone
18 should have considered that data?

19 Q. Sorry, I didn't ask the question
18:03:22 20 clearly enough.

21 A. You are saying --

22 Q. A Blackstone report that includes
23 projections for Inacom based on historical data
24 for the time period prior to April 22nd, should
18:03:36 25 that be used by someone trying to value Inacom as

1 **R. Whalen**

2 of April 22nd?

3 A. No, and I'll tell you why.

4 Blackstone's opinion and their thinking and all of
18:03:48 5 the judgment that went into it, you just told me
6 occurred in May of 2000.

7 Q. Yes.

8 A. The mosaic of facts that they used to
9 do whatever it was they did, and I apologize if I
18:04:02 10 should recall what they did, or if I have seen it,
11 I don't think I reviewed it in this process, that
12 the mosaic of opinions that they would have put
13 out there, or thinking that they would have used
14 to perform whatever tasks they performed, was
18:04:18 15 based on facts in evidence in May, not April 17 or
16 April 22nd.

17 Q. In an order to prepare their
18 projection, if the only data they used was data
19 that was available as of April 22nd, would you
18:04:43 20 still have the same opinion?

21 A. Yes, because they are doing their work
22 in May. What you are saying is -- they started
23 and stopped their work on a day in May and didn't
24 think about anything --

18:04:59 25 Q. No -- I understand your answer, let me

1 **R. Whalen**

2 ask a different way, or a different question.

3 Should the analyst trying to value Inacom as of

4 April 22 use the historical data contained in a

18:05:14 5 Blackstone report done in May, if it is historical
6 data for prior to April 22?

7 A. The analyst should use every piece of
8 data they can get their hands on. When you say
9 use, that means consider.

18:05:28 10 Q. Yes.

11 A. Try and acquire and think about, if
12 they think that some of the data is tainted by
13 post valuation data, they might consider it and
14 throw it out.

18:05:43 15 Q. So the analyst should look at
16 available information, even if it came out after
17 the valuation date --

18 A. What I'm assuming --

19 Q. Let me finish the question. If it
18:06:00 20 includes information that reasonably could have
21 been known prior to the valuation date?

22 A. Let me qualify what I just said. You
23 wouldn't consider something that came out in May,
24 that's after the valuation date. I thought what
18:06:11 25 you were describing is something that came out in

1 **R. Whalen**

2 May and used some data that was around in March,
3 that you knew about, you could have gotten from
4 some other source.

18:06:23 5 It was sitting there, and you found
6 it, so whether the data found its way into your
7 hand, because you did due diligence and you found
8 this data in March, or some other report that was
9 done later on pointed you towards it, I'm not sure
18:06:39 10 that matters to me, because they are pointing at
11 data that was around in March.

12 Q. The Inacom April 22, 2000 balance
13 sheet was something that you used in preparing
14 your report; correct?

18:06:54 15 A. Right, yes.

16 Q. Was that prepared after April 22nd?

17 A. I believe so.

18 Q. Do you know when it was prepared?

19 A. I don't know, I don't recall.

18:07:08 20 Q. It was prepared sometime after April
21 22?

22 A. I think so, yes.

23 Q. It is okay to use that why?

24 A. Because the data was there on April
18:07:18 25 22nd, and I do know that we did not have many,

1 **R. Whalen**

2 many choices. There was what, a March 25 balance
3 sheet and an April 22 balance sheet, and we were
4 trying to get a value as of April 17, so we chose
18:07:32 5 the 22nd because it was closer.

6 Q. I'm not quibbling with your choice of
7 which balance sheet to use.

8 A. There is a difference, though, between
9 a valuation firm coming in, in May, and giving an
18:07:46 10 opinion on financials, and a balance sheet data
11 sitting on a piece of paper. Balance sheets are
12 not supposed to be opinions of this and that, in
13 fact they are not even opinions sometimes of the
14 fair value of things, because there is historical
18:08:01 15 cost reporting for assets, and it is an opinion of
16 what the cash is in the checking account and all
17 that. I suppose that's an opinion, but it is
18 backed up by fact.

19 Q. Let's assume for the moment that the
18:08:16 20 Inacom April 22 balance sheet was completed the
21 same day as Blackstone's report came out, sometime
22 in May.

23 A. Okay.

24 Q. The data that was used to prepare the
18:08:27 25 April 22 balance sheet was also used in the

1 **R. Whalen**

2 Blackstone report. Would it be appropriate to
3 consider the information in the Blackstone report?

4 A. You don't need it, you already have
18:08:42 5 it. You mean that particular balance sheet and
6 those balances, current assets, \$10, fixed assets,
7 \$12.

8 Q. There may be additional data
9 underlying the balance sheet that's contained in
18:08:53 10 the Blackstone report that you don't see in the
11 balance?

12 A. I suppose if it is factual data that
13 was around on the valuation date, then I'm
14 thinking no matter where it comes from, you should
18:09:06 15 consider it. There is a difference between
16 creating a report with all the judgment that goes
17 into it, and the thinking cap on in May of 2000,
18 which is different than perhaps a thinking cap in
19 April, or March, or February. The difference
18:09:26 20 between assertions made in a report and financial
21 statement data on a page. Maybe that's where we
22 are diverging here.

23 Q. We are not, I'm just trying to
24 understand your opinion.

18:09:42 25 A. I think in general wherever you can

1 **R. Whalen**

2 get information that was reasonable knowledge by a
3 willing buyer as of the valuation date, and you
4 should endeavor to get as much information as they
18:09:53 5 can, but things that are put out there, published,
6 become public or become available after the
7 valuation date, you can't use, you can't consider
8 them, unless you pick a new valuation date.

9 Q. Let's say hypothetically you have a
18:10:25 10 valuation date of June 30?

11 A. Okay.

12 Q. And the most recent projection you
13 have in order to perform your analysis, have been
14 completed on January 1st, and those projections
18:10:40 15 relied on actual data prior to January 1st?

16 A. And the thinking on January 1st.

17 Q. Right.

18 **MR. POWELL:** Which January 1st?

19 **MR. CAINE:** Of the same year.

18:10:52 20 **THE WITNESS:** Before.

21 Q. You would use those January 1st
22 projections in preparing your valuation as of June
23 30?

24 A. Yes, or what I would try and do is
18:11:03 25 update those projections, make sure they are

1 **R. Whalen**

2 either still valid, trying to get the interim
3 financial statements from January to June,
4 internal whatever they had, to try and say this
18:11:16 5 was your opinion in January, I need your opinion
6 on June 30, what did you learn during those six
7 months, what happened to the business during those
8 six months, and would your opinion of these
9 projections which will go out a few years into the
18:11:28 10 future, has it changed.

11 Q. Let's assume the next set of
12 projections that come from the company are put out
13 on July 1st, the date after your valuation date,
14 projecting for the same time period that's got
18:11:44 15 maybe another six months out, and relying on
16 actual data between January 1 and June 30, you
17 wouldn't use those?

18 A. Can't, it is not allowed. Now,
19 remember what I said though, what I said was I'm
18:11:59 20 going to try and get -- figure out what everyone
21 was thinking on June 30, update the January
22 projections. So I would imagine if I did a good
23 job updating the January projections to June, I
24 would have been thinking most of the things they
18:12:14 25 were thinking -- see what your example, and let's

1 **R. Whalen**

2 say it was only a one day period, but it was
3 September 10 and September 11 of the year 2001 and
4 it is only two days apart, and on September 10 I'm
18:12:29 5 using some projections from six months ago, trying
6 to update them to 9/10, and there is a certain
7 picture of the world, and that's the picture I
8 have to use. It is a very different picture of
9 the world two days later, but I can't use it, it
18:12:45 10 is not allowed.

11 Q. Under no circumstances is it allowed?

12 A. Not allowed.

13 Q. Even if you had no good data between
14 January 1 and June 30, with which to try and
18:13:10 15 update your projections?

16 A. I would probably say can I pick July
17 2nd as my valuation date, because my analysis
18 would be a lot better, and if the purposes of the
19 deal allowed you to do that, you'd pick July 2nd
18:13:23 20 and then everybody is happy.

21 **MR. CAINE:** Give me a minute.

22 (Discussion off the record.)

23 (Recess taken.)

24 **MR. CAINE:** We are done, I have
18:18:20 25 nothing further.

1 **R. Whalen**

2 **EXAMINATION BY**

3 **MR. POWELL:**

4 Q. Mr. Whalen, I just have a couple of
18:20:09 5 questions for clarification, just so we make sure
6 that we have gotten your position correctly on the
7 record.

8 Do you agree with the Bridge report
9 that the companies used in the Duff & Phelps/Sasco
18:20:28 10 Hill Advisors Inacom Corp. valuation analysis,
11 Exhibit 1, are not comparable to Inacom?

12 A. Absolutely not, I don't agree with the
13 Bridge report saying they are not comparable.

14 Q. Are you confident of your conclusion
18:20:49 15 that the companies set forth in your report, which
16 is Exhibit 1, are indeed comparable to Inacom for
17 the purposes for which you used them?

18 A. Yes, they are.

19 Q. I heard a question and answer that I'm
18:21:05 20 also wanting to clarify. The question was
21 something like -- your answer was something to the
22 effect that it was not your opinion that the use
23 of post valuation data was permissible, and I
24 wanted to clarify, are you saying that in your
18:21:28 25 opinion, it is permissible to use post valuation

1 **R. Whalen**

2 data, or it is inappropriate to use post valuation
3 date data?

4 A. It is inappropriate to use post
18:21:42 5 valuation date data. I may have been unclear
6 because I didn't want it to sound like that was
7 just my opinion, I think that's valuation rules.

8 **MR. POWELL:** We reserve further
9 questions.

18:21:55 10 **FURTHER EXAMINATION**

11 **BY MR. CAINE:**

12 Q. The valuation rules to which you
13 refer, where are they from?

14 A. They are in most textbooks, Shannon
18:22:17 15 Pratt, third edition, if one does a Google search,
16 they can find it in many different places.
17 Shannon Pratt has a book called Valuing a
18 Business, it is one of the things you give the new
19 hires and say here, read this, kind of a
18:22:40 20 dictionary of business valuation, and there is a
21 section in there which stresses the importance of
22 using valuation data right at the valuation date.

23 I'm not sure which edition of Pratt
24 says don't go past your -- you know, it is one
18:22:58 25 thing to say don't use valuation data far afield

1

R. Whalen

2

from your date, it is another thing to say you are

3

not allowed to use anything after the valuation

4

date; but there are many valuation texts.

18:23:52

5

MR. CAINE: Read back the last answer.

6

(Record read.)

7

Q. Are you saying at times it is

8

permissible to use data not far afield from the

9

valuation indicate?

18:23:59

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(Continued on next page.)

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1 **R. Whalen**

2 A. No, I'm saying there are two different
3 assertions in the valuation text, the more general
4 assertion is stick to your date, use data right
18:24:08 5 around your date, the more specific one and
6 valuation rule we have been talking about is you
7 can look at history, but you have to use all
8 reasonable knowledge as of the valuation date.

9 **MR. CAINE:** Okay. I have nothing
18:24:23 10 further.

11 **MR. POWELL:** We reserve further
12 questions.

13 (Time Noted: 6:24 p.m.)

14

15

16

RICHARD A. WHALEN

17

18 Subscribed and sworn to before me
19 this _____ day of _____, 2005.

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21

22 (Notary Public) My Commission Expires:

23

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